No. 82-1771

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner,

v.

ALBERTO ANTONIO LEON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF RESPONDENTS

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No. 82-1771

In The
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UNITED STATES OF AMERICA,
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against

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On Writ of Certiorari to The United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE ON BEHALF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST

The Association of Trial Lawyers of America, founded 38 years ago, is a voluntary National Bar Association with a membership exceeding 50,000 advocates of

whom 5,000, constituting the Criminal Law Section, regularly appear in both state and federal courts in defense of those accused of crime. The men and women of the Association, the largest trial bar in the world, are pledged to the preservation of the American legal system, the protection of individual rights and liberties, and the evolution of the common law. The Association, through its appropriate officers and committees, has authorized its participation in this case as amicus curiae. This brief is filed with the written consent of all the parties.

The Association is vitally concerned with this appeal, not only for the instant case, but also for the effect the decision in this case will have on similar cases now pending throughout the

country as well as on the development of constitutional doctrine. Convinced that the efficacy of the Fourth Amendment protections depends on the unencumbered viability of the exclusionary rule, the Association believes that this case is of critical importance to its members and their clients.

SUMMARY OF ARGUMENT

Opponents of the exclusionary rule have chosen to identify its principal if not sole purpose as the deterrence of unconstitutional behavior by law enforcement officers. Having thus characterized the rule, they then place the onus upon its defenders to demonstrate empirically

that deterrence does result. While de terrence of unconstitutional acts is frequently demonstrable, though often difficult to quantify, the debate on this issue is largely a distraction from the fundamental justificaton: the Fourth Amendment provides for the liberty, property and privacy of individuals, and the exclusionary rule vindicates any deprivation of those rights.

Never has it been suggested that a utilitarian analysis be employed in re gard to the enforcement of other constitutional rights--for example, the exclusion of illegally obtained confessions, the right to confront one's accuser, or the effective assistance of counsel. In these and many other areas, once a constitutional deprivation was found, no reflection upon the deterrent effect of

voiding the conviction has been considered appropriate. The fact that the petitioner had been denied a constitutional right was good and sufficient reason for granting relief.

To speak in terms of balancing the rights of the individual against society's needs for law enforcement is misplaced in an analysis of the exclusionary rule. The balancing process is applicable, and in fact necessary, in defining the scope of the Fourth Amendment. When the balancing analysis is applied to the exclusionary rule an ominous result occurs: unconstitutional actions on the part of law enforcement officers are condoned. This Court has never held that practical needs could justify governmental acts that are unconstitutional.

While it is accurate to say that the

exclusionary rule is not explicit in the Fourth Amendment, this in no way distinguishes the Fourth Amendment from other provisions in the Bill of Rights. Read literally, nothing in the panoply of constitutional guarantees for those accused of crime specifies the remedy for a deprivation. The implication, however, has always been clear: a criminal conviction cannot stand if achieved at the cost of violating the constitution. Illegally obtained confessions may not be admitted into evidence, Spano v. New York, 360 U.S. 315 (1959), and a conviction obtained in violation of the right to counsel cannot stand, Gideon v. Wainwright, 372 U.S. 335 (1963); even though no provision in the Bill of Rights makes these results mandatory.

The adoption of a good faith exception to the exclusionary rule would seriously curtail the development of Fourth Amendment law. The landmark cases defining the scope of the Fourth Amendment have reached this Court only because convictions were obtained on evidence allegedly seized unconstitutionally. In some of the cases the government prevailed while in others the accused was vindicated. But if a good faith exception to the exclusionary rule had been applicable, the constitutional question might have been avoided altogether. Furthermore, the likelihood of the applicability of a good faith exception may in many cases remove the incentive to appeal, thus denying this Court the opportunity to clarify permissible law enforcement behavior. Such would likely

have been the result in Terry v. Ohio, 392 U.S. 1 (1968), in which the Court articulated constitutional guidelines for field investigation procedures where none had previously existed. Every jurisdiction has relied on the announced Terry standards and, overwhelmingly, the government has prevailed. See Cook, Constitutional Rights of the Accused: Pretrial Rights s7, at 55 n.10 (1972 and Supp.).

Adoption of a good faith exception to the exclusionary rule would also significantly reduce the incentive for law enforcement institutions to govern their conduct by Fourth Amendment standards. In Delaware v. Prouse, 440 U.S. 648 (1979) this Court reversed the drug related conviction, holding that random stopping of cars for driver's license checks was unconstitutional. However,

the Court took the opportunity to note that stops which eliminated the potential for the "unbridled discretion" of the officers would be constitutional. Had the conviction been allowed to stand because of the good faith of the arresting officer, the decision might well be interpreted to mean that random vehicle stops, though unconstitutional, were permissible so long as the officer acted in good faith. While disingenuousness on the part of law enforcement officials may not be tolerated, ignorance of the law may lead to the same result.

Ostensibly, the case now before this Court presents the most appealing situation in which to apply the good faith exception to the exclusionary rule. The officer sought and obtained a warrant

before carrying out the search and therefore had every reason to believe the search was constitutional. Indeed, it could be argued that every search made pursuant to a warrant, except for the rare case of fraud or collusion, is made in good faith. Thus evidence so obtained would be admissible, not because supported by probable cause but rather because made in good faith. Such a result could hardly be more antithetical to the Fourth Amendment. A warrant issued without the requisite probable cause is constitutionally void as this Court has held. Good faith is not interchangeable with probable cause. Terry v. Ohio, 392 U.S. 1 (1968); Beck v. Ohio, 379 U.S. 89 (1964). To admit evidence seized under a warrant unsupported by probable cause

would substitute good faith for the explicit requirements of the Fourth Amendment and render judicial review of warrant affidavits superfluous absent an allegation of bad faith on the part of the officer or the issuing magistrate.

ARGUMENT

I. THE EXCLUSIONARY RULE IS AN INDISPENSABLE COROLLARY TO THE FOURTH AMENDMENT.

A. The Fourth Amendment creates a personal constitutional right, and the exclusionary rule says no more than that the government should not gain from the denial of that right.

The Justices who held in Weeks v. United States, 232 U.S. 383 (1914) that evidence obtained in violation of the Fourth Amendment was inadmissible in federal prosecutions would "be quite surprised to learn that some day the value of the exclusionary rule would be

measured by--and the very life of the rule might depend on--an empirical evaluation of its efficacy in deterring police conduct." Kamisar, A Defense of the Exclusionary Rule, 15 Crim. L. Bull. 5 (1979). Rather, the exclusionary rule as originally articulated by this Court, rested on "a principled basis rather than an empirical proposition." Allen, The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases, 1975 U. Ill. L. F. 518, 536-37.

In Weeks, this Court said:

> The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under the limitations and restraints as to the exercise of such power and authority, . . . The tendency of those who execute the criminal laws . . . to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all

> times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.
>
> . . .
>
> The efforts of the courts and their officials to bring the guilty to punishment . . . are not to be aided by the sacrifice of [Fourth Amendment] principles. . . .To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.

Weeks v. United States, 232 U.S. 383, 391-92, 393-94 (1914). See also Schrock & Welsh, Up from Calandra: The Exclusionary Rule as a Constitutional Requirement, 59 Minn. L. Rev. 251, 257-60 (1974); Mertens & Wasserstrom, The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law, 70 Geo. L.J. 365, 377-78 (1981).

While the exclusionary rule deters unconstitutional police behavior (see IIC, infra), deterrence is an ancillary benefit of the rule. Opponents of the exclusionary rule have chosen to identify its principal, if not sole purpose as the deterrence of unconstitutional behavior by law enforcement officers. The debate regarding deterrence diverts attention from the fundamental justification for the exclusionary rule: the Fourth Amendment provides protection for the liberty, property and privacy of individuals, and the exclusionary rule vindicates any deprivation of these rights.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Like the

other provisions of the Bill of Rights, it recognizes a personal right and prohibits the violation of that right by the government. Id. The personal nature of the right protected by the Fourth Amendment has been acknowledged repeatedly by this Court in cases addressing the Fourth Amendment standing doctrine. Alderman v. United States, 394 U.S. 165, 171-72, 174 (1969) ("We adhere . . . to the general rule that Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." Id. at 174); Simmons v. United States, 390 U.S. 377, 389 (1968) ("[R]ights assured by the Fourth Amendment are personal rights, and . . . they may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search

and seizure." Id. at 389).

More recently in Rakas v. Illinois, 439 U.S. 128 (1978), this Court, while ostensibly eliminating standing as a distinct inquiry in Fourth Amendment cases, emphasized the personal nature of the protected interest. In Rakas, the defendants sought suppression of evidence obtained in a search of the automobile in which they were passengers. The Court "reaffirmed the principle that the 'rights assured by the Fourth Amendment are personal rights [which] . . . may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure,'" Simmons v. United States, 390 U.S., at 389 . . ." Id. at 138.

Notwithstanding the consistently reaffirmed recognition that the Fourth

Amendment protects a personal constitutional right, more recently this Court has expressed the view that the exclusionary rule is not itself an aspect of that right. Stone v. Powell, 428 U.S. 465 (1976). Rather, this Court has taken the view that "[t]he primary justification for the exclusionary rule . . . is the deterrence of police conduct that violates Fourth Amendment rights." Id. at 486. The constitutional history of the Fourth Amendment, however, counsels that this assumption be reassessed.

The requirement of a personal interest, whether recognized as a standing requirement or as part of the constitutional protection itself, is strong indication that the primary purpose for the exclusion of illegally seized evidence is not to deter police misconduct. Were

this the case, the focus of attention would be primarily upon the actions of the law enforcement officers, not upon the party raising the objection. If the purpose of the exclusionary rule was to effectuate deterrence, this Court should have abolished the personal interest requirement in cases such as Alderman v. United States, 394 U.S. 165 (1969), and Rakas v. Illinois, 439 U.S. 128 (1978). In Alderman, elimination of the standing requirement clearly would have fostered deterrence, but this Court explicitly rejected that course:

> The deterrent value of preventing the incrimination of those whose rights the police have violated has been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed . . . But we

> are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.

Alderman v. United States, 394 U.S. 165, 174-75 (1969).

Indeed, if deterring unconstitutional police activity were the dispositive factor in applying the exclusionary rule, United States v. Payner, 447 U.S. 727 (1980), presented a most compelling case for the exclusion of evidence. In Payner, the trial court found that, as a matter of strategy in tax investigations, "the Government affirmatively counsels its agents that the Fourth Amendment standing limitations permits them to purposefully conduct an unconstitutional search and seizure of one individual in

order to obtain evidence against third parties, who are the sole targets of the governmental instrusion, and that the IRS agents in this case acted, and will act in the future, according to that counsel." United States v. Payner, 434 F. Supp. 113, 132-33 (N.D. Ohio 1977). The deterrent effect of excluding evidence so obtained is apparent, but this Court refused to apply the exclusionary rule holding, "[o]ur Fourth Amendment decisions have established beyond any doubt that the interest in deterring illegal searches does not justify the exclusion of tainted evidence at the instance of a party who was not the victim of the challenged practices." United States v. Payner, 447 U.S. 727, 735 (1980).

The assumption that deterrence is the

'primary justification' for the exclusionary rule is therefore difficult to reconcile with, first, this Court's emphasis on the personal nature of the Fourth Amendment protection and, second, its frequent refusal to exclude evidence where the deterrent effect of doing so was clear. Moreover, there is a lack of constitutional justification for treating deterrence as the 'primary justification' for the exclusionary rule. Although the rigorous protection of constitutional rights inevitably entails the repudiation of official conduct which violates those rights, surely the pre-eminent reason for affording judicial relief is the mere fact that a right has been violated. Fourth Amendment claims offer nothing unique in this regard. An accused denied the Sixth Amendment right to counsel in a

criminal prosecution will have his conviction reversed solely because he has been denied a fundamental right. Gideon v. Wainwright, 372 U.S. 335 (1963). A salutary result of this decision may be to deter future courts from trying an accused without the assistance of counsel. But to justify the decision one need go no further than to observe that the party involved was denied a federal constitutional right. When a confession is suppressed because obtained by unconstitutional means, the effect of the decision will be to alter law enforcement practices to comply with articulated constitutional standards, but the primary justification for the holding is the vindication of rights protected by the Fifth, Sixth and/or Fourteenth Amendments. When this Court sustained the

right of a draft protester to carry a potentially offensive placard through the corridors of a court house in Cohen v. California, 403 U.S. 15 (1971), the decision may have encouraged greater governmental tolerance for unpopular and confrontational views, but the vindication of the First Amendment right of the petitioner was important enough, standing alone to support the decision. Cohen v. California, 403 U.S. 15, 24-25 (1971).

Proponents of modifying the exclusionary rule make the argument that individual rights must be balanced against societal needs for law enforcement. In its place, this is not only a plausible argument, but a central theme in this Court's interpretation of the Fourth Amendment. It is central to Chief Justice Warren's opinion for this Court in

Terry v. Ohio, 392 U.S. 1 (1968), legitimizing brief detention and frisks notwithstanding the absence of probable cause. The need to enforce prohibition laws generated an exception to the warrant requirement. See Carroll v. United States, 267 U.S. 132 (1925). The felt necessities of the times have sustained the practice of searching all persons boarding commercial air flights even though such practices would clearly have violated the Fourth Amendment in an earlier era. See e.g., United States v. Clay, 638 F.2d 889 (5th Cir.), cert. denied, 451 U.S. 917 (1981); United States v. Moreno, 475 F.2d 44 (5th Cir.), cert. denied, 414 U.S. 840 (1973); United States v. Bell, 464 F.2d 667 (2d Cir.), cert. denied, 409 U.S. 991 (1972); United States v. Epperson, 454 F.2d 769 (4th

Cir.), cert. denied, 406 U.S. 947 (1972) Shapiro v. State, 390 So.2d 344 (Fla. 1980), cert. denied, 450 U.S. 982 (1981); See generally Comment, Applying Constitutional Standards to Airport Security Searches, 5 Loy. U. Chi. L. J. 186 (1974); Comment, Searching for Hijackers: Constitutionality, Costs, and Alternatives, 40 U. Chi. L. Rev. 383 (1973).

In all these cases, however, the balancing process was employed in defining the scope of the protection of the Fourth Amendment. When used to support a modification of the exclusionary rule, however, something quite different is at issue. The argument is not that the Fourth Amendment protection should be tempered but that unconstitutional actions on the part of law enforcement

officers should be condoned. Never before has this Court held that practical needs could excuse governmental acts which were concededly unconstitutional. See Cann & Egbert, The Exclusionary Rule: Its Necessity in Constitutional Democracy, 23 How. L.J. 299, 319-20 (1980).

While it is implicit in virtually every action of this Court that behavior of parties other than those before the Court will be modified in an effort to comply with the Court's interpretation of the constitution, the primary concern of the Court is, and must be, whether constitutional standards have been satisfied in the case before it. If the government is found to have violated an individual's constitutional right, the government should not benefit from its wrong. To say that evidence seized in violation of

the Fourth Amendment may not be used to convict an accused is most notable for its obviousness.

B. That the Fourth Amendment does not by its terms preclude criminal convictions based on illegally seized evidence does not distinguish it from other constitutional protections, the deprivation of which have required the reversal of convictions.

Efforts to belittle the constitutional significance of the exclusionary rule have been encouraged by this Court's observation that it is but a "matter of judicial implication," Wolf v. Colorado, 338 U.S. 25, 28 (1949). More recently, in Stone v. Powell, 428 U.S. 465 (1976) this Court expressed the belief "that the [exclusionary] rule is not a personal constitutional right," but rather "a judicially created remedy designed to

safeguard Fourth Amendment rights generally through its deterrent effect . . . " Id. at 486. (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)). That these declarations are accurate is undeniable, but their significance is something less than might initially appear. While the Fourth Amendment contains no exclusionary rule, neither does any other provision of the Bill of Rights. Nowhere in the constitution does it say that illegally obtained confessions may not be admitted in evidence. Indeed, confessions are not mentioned in the constitution at all. Yet in Spano v. New York, 360 U.S. 315 (1959), this Court did not hesitate to order such evidence excluded, specifically noting that:

> abhorrence . . . to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also

> turns on the deeprooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods to convict those thought to be criminals as from the actual criminals themselves.

Id. at 320-21. See Kamisar, supra at 18-20. Nowhere in the Sixth Amendment does it say that when the accused has been denied the right of confrontation regarding a particular statement, such is to be excluded. But a conviction was reversed in Pointer v. Texas, 380 U.S. 400 (1965) upon a finding that "the Sixth Amendment's right of an accused to confront the witness against him is . . . a fundamental right and is made obligatory on the States by the Fourteenth Amendment." Id. at 403. Nowhere in the Sixth Amendment does it say that a conviction obtained in violation of the right to counsel cannot stand. But such was the

result in Gideon v. Wainwright, 372 U.S. 335 (1963), as well as hundreds of decisions following in its wake. In each of these instances, and many others, once this Court has found the substance of a constitutional right has been denied, the impropriety of permitting the government the advantage of the deprivation has been so self-evident that the question is rarely raised outside the context of harmless error.

Indeed, to say that the exclusionary rule is but a "matter of judicial implication" is to do little more than to describe the function of this Court in constitutional interpretation. As Professor Kamisar has noted, disparaging the exclusionary rule as "judicial implication" is not "much of a point . . . unless somebody can cite me one Supreme

Court case interpreting the Constitution that is not 'a matter of judicial implication.'" Kamisar, supra at 16. Indeed, this Court "cannot escape the demands of judging or making difficult appraisals." Haynes v. Washington, 373 U.S. 503, 515 (1963). It is its task to determine what the constitution commands beyond that which it literally says. The rationale for the exclusionary rule was forthrightly explained in Weeks: "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment . . . is of no value, and, . . . might as well be stricken from the Constitution." Weeks v. United States, 232 U.S. 383, 393 (1914). That Court was unaware of any extraordinary "judicial implication" on

its part when it concluded that "[t]he efforts of the courts and their officials to bring the guilty to punishment . . . are not to be aided by the sacrifice of [Fourth Amendment] principles." Id. at 393. Six years later, Justice Holmes found this reasoning compelling in speaking for the Court: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). Indeed, the application of the exclusionary rule after the fact of the constitutional violation is conceptually indistinguishable from the requirement that the Fourth Amendment protections be complied with prior to the issuance of a

warrant to prevent a constitutional violation. In the latter case, a violation of the Fourth Amendment may be forestalled; in the former, the design is to resume the status quo ante, as if the search had not occurred.

II. THE ADOPTION OF A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE WOULD BE ANTITHETICAL TO THE PROTECTION OF LIBERTY MANDATED BY THE FOURTH AMENDMENT

A. The adoption of a good faith exception to the exclusionary rule would effectively diminish the substantive protection of the Fourth Amendment.

The refusal of a court to exclude evidence from a criminal trial when that evidence has been obtained as the result of a violation of the Fourth Amendment, is nothing less than a refusal to honor a constitutional right. This is true even if a civil rights action is available to vindicate the deprivation, or if internal

disciplinary sanctions are invoked against the offending officer. If the evidence is used to convict, then the constitutional right, that is the constitutional limitation upon governmental action, has been denied. The logic of the foregoing has never been questioned in the context of confessions: an involuntary confession may not be introduced in evidence. That the events that produced the confession might give rise to a tort claim, or an action for damages for the deprivation of a civil right, or the disciplining of the responsible officials, has no bearing on the admissibility of the confession at a criminal trial.

No member of this Court has taken the view that under no circumstances should illegally seized evidence be excluded.

Justice Frankfurter dissented from the holding of this Court in Mapp v. Ohio, 367 U.S. 643 (1961), yet he wrote for a unanimous Court in Rochin v. California, 342 U.S. 165 (1952), excluding evidence obtained by non-consensual stomach pumping. The lesson of Rochin is that at some point, any constitutionally sensitive judge "will not care about or even think about 'alternatives' to the remedy of exclusion; he will exclude the evidence however logically relevant and verifiable it be, or, if the court below admitted it, he simply will not let the conviction stand." Kamisar, supra at 30. The question, therefore, is not whether there should be an exclusionary rule but where the line should be drawn.

In the past, Justices have disagreed as to when the Fourth Amendment should

apply, substantively and jurisdictionally. The present dispute, however, begins with the assumption that a violation of the constitutional protection has occurred but maintains that under some circumstances the exclusionary rule nevertheless should not apply. Should this Court adopt any exception to the exclusionary rule, it would be tantamount to holding that certain violations of the Fourth Amendment--although most assuredly violations--are not deserving of protection. For all practical purposes, this is simply to say there was no violation at all. In no other area of constitutional rights has this Court held that a deprivation has occurred but vindication was unnecessary. In the words of one commentator:

> Does a court that admits the evidence in such a case not

> manifest a willingness to "put up with" the unconstitutional conduct that produced it? If so, how can the police and the citizenry be expected "to believe that the government truly meant to forbid the conduct in the first place"?

Kamisar, supra at 33 (quoting Paulsen, The Exclusionary Rule and Misconduct by the Police, 52 U. Crim. L.C. & P.S. 255, 258 (1961)). A deliberate and egregious deprivation of a Fourth Amendment right is obvious, and exclusion of evidence so obtained is not criticized by even ardent supporters of a good faith exception to the exclusionary rule. But any violation of a constitutional right, no matter how subtle, cannot be ignored. Indeed, the less flagrant violations may well be those for which the exclusionary rule is most important. As one commentator has noted, "The more violent and obvious infringements may be curtailed through

civil or criminal actions against the guilty officers." (emphasis added). Atkinson, Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures, 25 Colum. L. Rev. 11, 24 (1925). If good faith violations of the Fourth Amendment are not interdicted by the exclusionary rule, they will not be curtailed at all.

B. The adoption of a good faith exception to the exclusionary rule would curtail the development of Fourth Amendment law

The landmark cases which have shaped the meaning of the Fourth Amendment have reached this Court only because the victims of certain law enforcement methods have been convicted of crimes by use of evidence allegedly obtained in violation of the Fourth Amendment. The ultimate question in many of the more significant

precedents--Terry v. Ohio, 392 U.S. 1 (1968); Chimel v. California, 395 U.S. 752 (1969): Delaware v. Prouse, 440 U.S. 648 (1979); Katz v. United States, 389 U.S. 347 (1967); Payton v. New York, 445 U.S. 573 (1980); Chambers v. Maroney, 399 U.S. 42 (1976); Spinelli v. United States, 393 U.S. 410 (1969)--was the same: whether seized evidence should be excluded from the trial of the accused. In some of these cases the government prevailed; in others the accused was vindicated. But--and this is the important point--in all of these cases most observers would agree that the challenged acts of law enforcement officers were carried out in good faith.

Had a good faith exception to the exclusionary rule been in effect at the time these cases arose, it is doubtful

that most of them would have achieved any precedential significance. Judicial restraint counsels that courts avoid answering constitutional questions. (See Ashwander v. T.V.A., 297 U.S. 288, 341, 346-48 (1936) in which the concurring opinion of Justice Brandeis summarized the practice of this Court in avoiding constitutional questions. "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." Id. at 347.). It follows that once the good faith of the officers has been determined and the evidence held to be admissible, there is no need to decide if a constitutional right was actually violated.

Even assuming courts would determine

the constitutionality of the officer's behavior, the case may never reach even a lower appellate court let alone the Supreme Court. See Mertens & Wasserstrom, supra, at 449-54. For example, in Terry, it would have been pointless for the defense to appeal the questions to this Court, for if anything is clear in the Terry case, it is that Officer McFadden is a model patrolman, responding to a set of suspicious circumstances in a highly professional, efficient and humane manner. Because a finding of good faith is inevitable, there would be no incentive for the accused to appeal, even if there were a strong possibility of success on the substantive issue.

The result in the case might be the same, but this Court would have been denied the opportunity to address an

important, and at the time of Terry, highly confused issue: the application of the Fourth Amendment to confrontations between law enforcement agents and suspects which fall short of arrest and search. By its careful examination of the questions in Terry, this Court did more than give its approval to the tactics involved in a particular field investigation. It gave stop and frisk practices general constitutional ap proval. It approved guidelines where none had previously existed for the instruction of law enforcement personnel in field investigation procedures. In the fifteen years since Terry, thousands of appellate decisions from every jurisdiction have relied upon its standards in scrutinzing field detentions and frisks, and in the overwhelming majority of

cases, the government has prevailed. See Cook, Constitutional Rights of the Accused: Pretrial Rights s7, at 55 n.10 (1972 & Supp.) This opportunity to provide meaningful parameters on the Fourth Amendment would have been lost had Terry gone unlitigated at the appellate level or unexplored by this Court in light of the good faith of the arresting officers. The same may very well be true in virtually every case in which this Court has made significant pronouncements on the meaning and scope of the Fourth Amendment. See Mertens & Wasserstrom, supra at 401 et. seq.

C. The adoption of a good faith exception to the exclusionary rule would significantly diminish the motivation for institutions of law enforcement to govern their conduct by Fourth Amendment standards

A major thrust of the argument favoring a good faith exception to the exclusionary rule is that, so long as law enforcement officers have acted in good faith in executing their duties, nothing will be accomplished by excluding the evidence obtained even illegally, because the reasonable belief of the officer in the legality of his or her conduct precludes a deterrent effect. While the deterrent effect of the exclusionary rule should not be the dispositive question before this Court, the argument in any event fails to credit what Mertens and Wasserstrom have identified as "systemic deterrence." Mertens & Wasserstrom, supra at 399 et seq.

Consider, for example, the decision in Delaware v. Prouse, 440 U.S. 648 (1979). There, this Court held that the

'unbridled discretion' of a police officer in stopping at random an automobile to check the validity of the license of the driver could not be countenanced under the Fourth Amendment. While the dissent in Prouse observed that there was no allegation or evidence of abuse of discretion by the police officer, the majority of this Court was convinced that the potential for abuse was enough. Reversing the conviction because evidence obtained in violation of the Fourth Amendment had been admitted at trial, this Court used the opportunity to suggest that roadblocks set up to check the licenses of all drivers passing a particular point during a particular time period would not run afoul of the constitution, Delaware v. Prouse, 440 U.S. 648, 663 (1979), and the concurring

opinion added the caveat that something short of stopping all vehicles--every third vehicle, for example--would be acceptable as well.

There would appear little reason to doubt that the arresting officer in Prouse acted in good faith. Had a good faith exception to the exclusionary rule been employed to resolve that case, the constitutionality of the stop might never have been addressed. Even if the trial court did address the constitutional question, if a good faith exception were allowed and its application were fairly inevitable, the case would never have been appealed. Thus, law enforcement officers would still not know whether random traffic stops were constitutional, a determination that needed to be made, considering the uncertainty in that area

of law enforcement. See cases cited in Delaware v. Prouse, 440 U.S. at 651 nn. 2-3.

An even more ominous outcome could easily have resulted from the application of the good faith exception in Prouse. The message would be clear: the random stopping of an automobile with no particularized suspicion to check a driver's license violates the Fourth Amendment but if the defendant cannot demonstrate that the officer acted in bad faith in selecting him for the check (based, for example, on his race, or age, or the type motor vehicle), any evidence of crime fortuitously discovered will be admissible, notwithstanding the constitutional violation. This might encourage some law enforcement agencies to fail to communicate the most recent relevant constitutional decisions to their personnel. The

same lack of knowledge on the part of police may result even absent an intentional withholding of information. For example, in a rural setting police may not have the resources or the institutional structure to inform themselves of the latest constitutional mandates. In either event, if the policeman "on the beat" did not know that his selection of a car based on his "unbridled discretion" was unconstitutional and the defendant could not prove obvious bad faith, the policeman would surely testify to his own subjective good faith, and the evidence, even though obtained clearly in violation of the constitution, would be admissible. In short, the application of the good faith exception in Prouse may well encourage unconstitutional behavior so long as it is done in an acceptable manner.

This is, of course, not what this Court did in Prouse. It held the practice unconstitutional, and it excluded the evidence. The message to law enforcement officers was clear: random stops of motor vehicles without particularized suspicion will not be tolerated. License checks of motorists, without particularized suspicion, are nevertheless permissible if the element of unbridled discretion is removed. Stated simply, Prouse told law enforcement officials how to and how not to go about achieving what was concededly a legitimate objective. Implementation of the guidelines enables the police to obtain the information they seek while ensuring the protection of constitutional rights.

In the years since Prouse, the decision has frequently provided the controlling precedent in license check cases in

the lower courts. Sometimes convictions have been reversed for the same reasons this Court reversed Prouse. See e.g., Keenan v. State, 372 So.2d 1012 (Fla. Dist. Ct. App. 1979) (unreasonable stop under Prouse); People v. Kunath, 99 Ill. App. 3d 201, 425 N.E.2d 486 (1981) ("stop of the car was more in the nature of a mere hunch . . . rather than on specific and articulated facts . . ."); State v. Hilleshiem, 291 N.W.2d 314 (Iowa 1980) State v. Wilson, 388 So.2d 744 (La. 1980); Goode v. State, 41 Md. App. 623, 398 A.2d 801 (1979); State v. Westbrook, 594 S.W.2d 741 (Tenn. Crim. App. 1979). In other cases, however, law enforcement agencies have followed the guidance provided in Prouse, and convictions obtained as a result of evidence seized during license checks have been sustained, not

because the officers acted in good faith, but because they had acted in a wholly constitutional fashion. See e.g., United States v. Pritchard, 645 F.2d 854 (10th Cir.), cert. denied, 454 U.S. 832 (1981); People v. Carlton, 81 Ill. App. 3d 738, 402 N.E.2d 310 (1981); People v. John BB., 56 N.Y.2d 482, 438 N.E.2d 864, 453 N.Y.S.2d 158 (1982); State v. Shankle, 58 Or. App. 134, 647 P.2d 959 (1982). Indeed, Prouse has been used for direct guidance in some police departments. For example, "The written policy of the Roxbury (New Jersey) Township police department is to stop every fifth vehicle during certain light traffic hours." State v. Coccomo, 177 N.J. Super. 575, 579, 427 A.2d 131, 133 (1980). The court noted in a footnote that "In September 1979, the Morris County Prosecutor

strongly urged each municipal police department to adopt rules and procedures to adjust their police practices to the Prouse proscriptions. Along with a summary of Prouse, a set of regulations approved by the Attorney General of New Jersey was also forwarded to the chiefs." Id. at n.1. The evidence was not suppressed in the case, because the procedures adopted and used by the police were reasonable and constitutional. See also Mertens & Wasserstrom, supra at 399-401, for an account of similar actions taken by the District of Columbia Metropolitan Police.

The desirability of providing police with guidance so they may obtain information they need without fear of it being found inadmissible is self-evident. This interaction between the holding of this

Court and law enforcement agencies has led to the optimum result. The Fourth Amendment rights of motorists have been articulated clearly, while the practical needs of law enforcement have been given their due.

D. The adoption of a good faith exception to the exclusionary rule in cases involving an improperly issued warrant would seriously erode the protection of the Fourth Amendment

The adoption of a good faith exception to the exclusionary rule would appear to reach its highest level of plausibility in cases such as the one presently before this Court in which the officer has sought and obtained a warrant before carrying out the search. When acting pursuant to a judicial order, which will carry a presumption of validity, the officer has every reason to believe the search is constitutional. This Court has

always favored the use of warrants, Terry v. Ohio, 392 U.S. 1, 20 (1968); United States v. Ventresca, 380 U.S. 102, 106-7 (1965); United States v. Lefkowitz, 285 U.S. 452, 464 (1932), and has implied a more lenient standard of probable cause might be appropriate when a warrant is obtained. In Aguilar v. Texas, 378 U.S. 108 (1964) this Court stated that "when a search is based upon a magistrate's, rather than a police officer's, determin ation of probable cause, the reviewing courts will accept evidence of a less 'judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant.'" Id. at 111 (quoting Jones v. United States, 362 U.S. 257, 270 (1960)).

From this it might be argued that,

but for the rare case of fraud or collusion, searches made pursuant to warrants are made in good faith. The result would be that evidence obtained in virtually all warrant searches would be admissible, not because supported by probable cause, but simply because made in good faith.

Such a result could hardly be more antithetical to the Fourth Amendment. The Amendment states categorically that ". . . no warrants shall issue, but upon probable cause." U.S. Const. amend. IV. It follows that any warrant issued without the requisite probable cause is constitutionally void and cannot provide justification for a search, and this Court has consistently so held. Franks v. Delaware, 438 U.S. 154 (1978) (if material in an affidavit is found to be

false and set aside and the "remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." Id. at 156); Aguilar v. Texas, 378 U.S. 108 (1964)("the search warrant should not have been issued because the affidavit did not provide a sufficient basis for a finding of proba ble cause and . . . the evidence obtained as a result of the search warrant was inadmissible. . ." Id. at 115-16). Nothing in the Fourth Amendment suggests that the requirement of probable cause can be replaced by good faith, and this Court has repeatedly held on the issue of probable cause that good faith can add nothing to facts which fail to satisfy

that requirement. Beck v. Ohio, 379 U.S. 89 (1964); Henry v. United States, 361 U.S. 98 (1959). As this Court observed in Terry v. Ohio, 392 U.S. 1 (1968):

> And simple "'good faith on the part of the arresting officer is not enough.'. . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police."

Id. at 22 (quoting Beck v. Ohio, 379 U.S. 89, 97 (1964)). See also Hill v. California, 401 U.S. 797 (1971) ("subjective good-faith belief would not in itself justify either the arrest or the subsequent search." Id. at 804). To admit evidence seized under a warrant unsupported by probable cause would substitute good faith for the explicit requirements of the Fourth Amendment and render judicial review of warrant affidavits superfluous absent an allegation of bad faith

on the part of the officer or issuing magistrate.

CONCLUSION

Nearly thirty years ago, substantial commentary was generated by a footnote to this Court's opinion in Brown v. Board of Education, 347 U.S. 483 (1954), which had led some to the conclusion that racially segregated public schools were unconstitutional because such schools were empir ically shown to be deleterious to the education of black school children. Commentators admonished the "dangerous precedent" if Brown turned upon the vagaries of the evidence of social scientists. See Cahn, Jurisprudence, 30 N.Y.U.L. Rev. 150 (1955); Wechsler, Principles, Politics and Fundamental Law:

Selected Essays, "Toward Neutral Principles of Constitutional Law," 43-47 (1961). Subsequent decisions of this Court made clear that these fears were unwarranted. Racially segregated facilities were unconstitutional for reasons of constitutional principle: the equal protection clause of the Fourteenth Amendment did not countenance racial classifications.

A comparable choice arises in the issue presented to the Court in this case. Advocates of an exception to the exclusionary rule wish to confine the enforcement of the Fourth Amendment to those cases in which a deterrent effect upon law enforcement practices can be shown. Just as the Equal Protection clause is not addressed to maximizing the

quality of education, so the Fourth Amendment is not concerned solely or even primarily with regulating the future behavior of law enforcement officers. To so hamstring the Fourth Amendment by the principle of utility would deny its stature as a fundamental constitutional right which, like all other provisions of the Bill of Rights, requires no other justification for rigorous enforcement and, therefore, for the foregoing reasons, Amicus Curiae, the Association of Trial Lawyers of America respectfully submits that the decision of the United States Court of Appeals for the Ninth Circuit, upholding the suppression of the seized evidence, should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 1983, true and correct copies of the foregoing Brief for Amicus Curiae, The Association of Trial Lawyers of America, were deposited in the United States Postal Service with first class postage prepaid and properly addressed to the following counsel for parties to this appeal:

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